

Thomas D. Ourada
Wisconsin State Representative



July 22, 1996

Representative Al Ott, Chair
Assembly Committee on Agriculture
318 North, State Capitol
Madison, Wisconsin 53702

Dear Chair Ott: *Al*

Recently Clearinghouse Rule 96-009, relating to milk volume regulations, was referred to your committee for review. I have received correspondence from a cheese maker in my district opposed to the rule change, and I feel that many of their concerns are valid.

Enclosed for your information is a copy of this correspondence. While we want to make the practice of volume premiums equitable for both large and small farmers, we also do not want to threaten the supply of milk for processors.

My constituent suggests that while the goal behind the rule is laudable, the direction this rule takes is not enforceable and actually works against the goal. He suggests that a better way to view this issue is to focus on the hauling charges paid by farmers rather than the volume premium, as it places the costs on the highest user and would charge for transportation costs separate from the product itself.

I encourage you to consider holding a hearing on this rule so that further discussion can take place as to how best handle this issue. I understand that the issue is controversial, which is even more the reason why this rule should not be approved by the Legislature without full discussion of its ramifications for Wisconsin's dairy industry.

Thank you for your time and consideration.

Sincerely,

Tom

TOM OURADA
State Representative
35th Assembly District

cc: Members, Assembly Committee on Agriculture

A B C D E F G H I J K

Cost Savings Available

Volume Brackets	Number of Producers	Allocated Costs	Average Producer Volume	December 1995 Volume	Allocated Costs/CWT	DATCP		Dean Method (Base Comparison)	Dean Volume Premium Schedule	Dean Difference Between Brackets	Amount Available To Pass in Bracket
						Method (Marginal Comparison)	Method (Base Comparison)				
1. 0 - 39,999	76	\$20,751	27,286	2,073,736	1.0007	\$0.0000	0.0000	\$0.0000	\$0.0000	\$0.0000	\$0.0000
2. 40,000 - 79,999	231	63,072	59,340	13,707,540	0.4601	1.0667	0.4601	0.5406	0.1000	0.1000	0.4406
3. 80,000 - 119,999	144	39,318	96,737	13,930,128	0.2822	0.1779	0.7185	0.1500	0.1500	0.0500	0.1279
4. 120,000 - 149,999	37	10,102	133,860	4,952,820	0.2040	.0792	0.7967	0.2000	0.2000	0.0500	0.7320
5. 150,000 - 179,000	25	6,826	160,409	4,010,225	0.1702	0.0338	0.8305	0.3000	0.3000	0.1000	-0.0662
6. 180,000 - 209,999	17	4,642	196,096	3,333,632	0.1392	0.0310	0.8615	0.4000	0.4000	0.1000	-0.0690
7. 210,000 - 249,999	4	1,092	225,748	902,992	0.1209	0.0183	0.8798	0.5000	0.5000	0.1000	-0.0817
8. 250,000 - 349,999	7	1,911	286,310	2,004,170	0.0954	0.0255	0.9053	0.7000	0.7000	0.2000	-0.1745
9. 350,000 - 499,999	2	546	391,543	783,086	0.0697	0.0257	0.9310	0.8500	0.8500	0.1500	-0.1243
10. 500,000 & Over	2	546	608,818	1,217,636	0.0448	0.0249	0.9559	0.9000	0.9000	0.0500	-0.0251
TOTALS	545	\$148,807	\$2,186,147	\$46,915,965	\$2.5874						

KEY

Monthly Procurement Cost Divided by Producers Equals \$273.04
 Column C = Column B value x \$273.04
 Column E = Column B value x Column D value
 Column F = Column C value / Column E / 100
 Column G = Value of Column F subtracted from preceding Column F value
 Column H = Value of Column F minus \$1.0007 (base value in Column F)
 Column J = Value of Column I minus preceding Column I value
 Column K = Value of Column G minus value of Column J

Chairman:
Agriculture Committee



Member:
Environment & Utilities
Government Operations
Natural Resources
Rural Affairs

Al Ott

State Representative • 3rd Assembly District

Assembly Agriculture Committee

MEMO

To: Members of the Assembly Agriculture Committee

From: Representative Al Ott, Chair

Date: July 9, 1996

The following clearinghouse rule has been referred to the Assembly Agriculture Committee:

Rule No. 96-009: relating to payroll statements to milk producers and price discrimination in milk procurement.

The deadline for committee action on this rule is August 7, 1996. If you would like a copy of the rule, please contact my office at 266-5831.



Wisconsin Dairy Products Association, Inc.

July 1, 1996

Representative Al Ott
P.O. Box 8953
Madison, WI 53708

Dear Representative Ott:

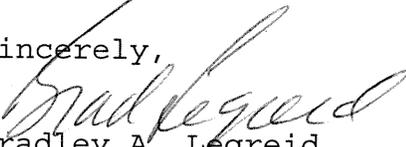
On June 14, 1996, the Wisconsin Department of Agriculture, Trade & Consumer Protection (WDATCP) narrowly approved a final draft rule pertaining to milk volume premiums. This rule, ATCP 100, has now been sent to the Wisconsin Legislature for a thirty day review period. Wisconsin Dairy Products Association (WDPA) wishes to register its strong opposition to this rule.

The biggest problem with this rule is that it is unenforceable. The WDATCP has had an emergency rule in place since January 1, 1996 and has been unable to properly enforce it (this emergency rule did expire on May 31, 1996).

In 1992, the Department attempted to regulate quality premiums, with the resulting debate becoming a fiasco in the Legislature. Realizing the futility of trying to regulate these premiums, the Department took the appropriate action by requesting the Legislature to exempt quality premiums from the discrimination law (Section 100.22 Stats.). Volume premiums are similar to quality premiums in that they are both difficult to regulate due to the competitive nature of the marketplace. However, for some inexplicable reason, the Department has decided to vigorously pursue regulation of volume premiums, even to the extent that it ignored the recommendations of its own advisory committee which studied this issue for two years. The WDATCP Volume Premium Advisory Committee had concluded that it was not feasible to regulate volume premiums and that the Department should allow the market to work by itself.

For your information, I have included WDPA's testimony from the June 14 WDATCP Board of Directors' meeting. Since this rule is likely to be assigned to the Senate and Assembly Ag Committees, WDPA encourages these committees to consider holding hearings in order to receive comprehensive testimony on this issue. Thank you for your time and attention.

Sincerely,


Bradley A. Legreid
Executive Director



Wisconsin Dairy Products Association, Inc.

VOLUME PREMIUM TESTIMONY

June 14, 1996

Presented by Brad Legreid, Executive Director

- The Wisconsin Dairy Products Association is testifying today in opposition to the final draft rule related to milk volume premiums.
- The reason for this opposition is because last year, the WDPA Board of Directors approved the following resolution:

The Wisconsin Dairy Products Association supports the removal of the price discrimination statutes regarding the pricing of milk from milk producers due to its demonstrated unenforceability.
- We believe the biggest problem with this rule is the Dept's ability to enforce it. Many of my members believe that the current law is unenforceable.
- The Dept. has stated many times that the only way this rule will work is if they attain 100% compliance from industry on a voluntary basis.
- However, it's obvious that this total compliance has not occurred. That is evident from the fact that as of January 1, some companies did not change their premiums. And once other companies saw these companies not complying, many of them questioned their own compliance. It was a snowball effect.
- There is too much competition in the countryside to expect 100% compliance. Plants do not want to lose their large producers to other competitors.

- Is it possible for DATCP to regulate competition in the marketplace? It attempted to with Quality Premiums four years ago and that became a fiasco in the Legislature. I don't think there is a single legislator on either the Senate or Assembly Ag Committees that wishes to be involved in another acrimonious public hearing similar to the volatile quality premium hearings in 1992.

- Will the same thing happen again this time with volume premiums?

- It is also troubling to see quality premiums mentioned many times in this final draft. These premiums were not included in the emergency rule or the original final rule. But they are in this final draft.

The issue of volume premiums was supposed to be settled in 1992. The Dept. had taken action to exempt these premiums from the discrimination law. But, four years later, here they are again.

I realize that the Dept. is attempting to separate and make a distinction between volume and quality premiums for cost justification purposes. However, by bringing quality premiums back into the picture, there will be a perception, real or not, that the Dept. is once again trying to regulate quality premiums in addition to volume premiums. This perception could become quite problematic for the Dept.

- Small producers have complained about volume premiums, but the Dept. is also hearing from the large producers now by means of a lawsuit. This lawsuit is affecting the Dept's ability to enforce the emergency rule, a rule that expired as of May 31, 1996. And there's another problem - by letting the emergency rule expire without seeking an extension or having a permanent rule to immediately replace it, will that further hinder the Dept's ability to enforce this rule?

- The fact is, the Dept's own advisory committee that was formed to address this issue was almost unanimous in its opposition to departmental regulation. The message from this advisory committee was to let the market work by itself, without hindering it with unnecessary regulations. In addition, a large portion of industry has been opposed to any type of regulation.

- However, the Dept. ignored the recommendations of its advisory committee and went ahead and established this rule.

- Both the emergency rule, which WDPA testified against, and this permanent rule are somewhat similar except that the permanent rule incorporates Wisconsin's "Little FTC Act" (Section 100.20 Stats.). The Dept. wanted to include this section in the permanent rule in order to allow producers and/or competitors to sue the supposedly "offending" violator directly.
- You must wonder if the Dept. incorporated this legal provision into the permanent rule in hopes that private individuals and other companies would commence legal action against "offending" parties. This would take the full onus of enforcement off the Dept's shoulders.
- That's important to the Dept. since there have been concerns and questions about the legality of this rule from day one. There are so many gray areas in this rule. Since there's a plethora of variables involved in milk pricing, it makes it extremely difficult to enforce the "cost justification" or "meeting competition" portions of this rule. And I wonder how cooperative the Justice Dept. will be in helping the Dept. enforce this rule when DATCP just took Consumer Protection away from Justice.
- The specter of long, costly legal suits hangs over this permanent rule.
- It's also ironic that this rule is rewarding plants that are inefficient. I say this because the more inefficient a plant is, the higher their costs are. With higher plant costs, a plant can justify higher volume premiums. If an inefficient plant pays higher volume premiums, more producers may go to that inefficient plant. But I don't believe the Dept. wishes to promote and reward inefficiencies - however, that is a byproduct of this rule.
- The Dept. will be saying today that they have made a lot of changes to this final draft rule based on their recent experiences in trying to enforce it. However, many of these changes are minor and really do not address the real problem - that it is extremely difficult, if not impossible, to regulate competition.
- Therefore, Wisconsin Dairy Products Assn. respectfully requests that the Dept. take the appropriate actions to remove the price discrimination statutes regarding the pricing of milk from milk producers due to its demonstrated unenforceability.

- In addition to the volume premium rule, this hearing is also receiving testimony on technical rule changes related to milk producer payroll statements. WDPA supports the proposed changes designed to make milk paychecks consistent with the new multiple component pricing.
- One final issue I would like to speak on is the laboratory certification program. Today, Steve Steinhoff will be asking for permission to hold public hearings on a draft rule relating to new lab certification fees.
- Wisconsin Dairy Products Assn supports this request. WDPA was the first association to initiate action to transfer the laboratory certification program from the Dept. of Health and Social Services to DATCP. Two years ago, our association began meeting with the Dept. of Health and since that time has been the only trade organization involved in this transfer.
- WDPA members recognized the importance of this program and the need to transfer it to DATCP where it would receive proper attention.
- WDPA was also successful in adding a second full-time lab evaluation officer to this program in order to meet the increasing demands of the certification program.
- Our association knew that with the addition of a second LEO, fees would have to increase. Therefore, we have been working with the Dept. during the past year to establish a fair and equitable fee structure.
- I would like to commend and thank Steve Steinhoff and Tom Leitzke for their diligence and hard work in transferring this program from Bureau of Health to DATCP.
- Thank you



The
Antigo
Cheese
Company

907 9th Avenue • P.O. Box 503 • Antigo, WI 54409-0503

Telephone
(715) 623-2301
FAX: (715) 623-4501

Representative Thomas Ourada
Room 308-N
P.O. Box 8953
Madison, Wisconsin 53708-8953

July 3, 1996

Dear Representative Ourada,

The recent action by the Agriculture Board to approve "Milk Volume Regulations" was a mistake (the rule amends ch. ATCP 100, Wis. Adm. Code). As written, the State Statutes proposed by the Department of Agriculture, Trade and Consumer Protections will not meet the objective of complying with discriminatory pricing based on volume premiums paid to dairy farmers. The rule prohibits dairy operators from discriminatory pricing, unless justified by measurable differences. Different volume premiums can be paid if the dairy operator can establish the different related costs to purchase different volumes of milk or based the on volume programs of competing plants.

The intention of the rule is not in question but the procedures of the rule itself. The policy as written is **not enforceable**. The rule relies on justification of premiums and that all dairy operators will not go beyond the paycheck to achieve and retain large milk producers.

The justification section of the rule relies on a set of guidelines to calculate volume premiums. A small plant has higher per farm cost to procure milk. Volume premiums based on justification means the least efficient plant will have the greatest procurement advantage. The other item in finding the cost to justify a premium is the hauling of the milk. Not every plant buys that service in the same manner. A plant that owns its trucks will have an advantage in adjusting the fees to calculate premiums. Justification of a premium for discriminatory pricing on the hidden cost to service that farmer, opens the door to a heavily regulated state run system.

The other justification clause is competition. If the competition is paying a higher volume premium, then I can pay that premium as well. Based on this, all plants will have the same highest premiums of the least efficient plant.

No plant can afford to lose a large portion of its milk supply. Plants are now reaching hundreds of miles into new areas to procure the biggest and best farms of that new area. The State's idea to limit the spread of high premiums to only areas where it is actually being paid is unrealistic in today's fast paced society. Zoning volume premiums only to where the competition

has milk will only inflate the problems of today. It lets the cows out of the barn, and then we shut the door. The rule itself will be in violation of itself in that we will have volume premiums from the same plant varying based on the competition in that farmer's area. Thus a farmer in one area will be paid more for volume because the competition is more intense than another.

The rule will not be enforceable. The State Department of Agriculture only covers premiums on the pay check. Many plants today offer incentives that do not show up on the pay check such as farm improvements loans for bulk tanks, wells, cattle, pipeline, etc. Another incentive used is hauler rebates, where the plant or hauler gives the farmer cash above and beyond the stated dairy plants' program. In short, honest plants will be penalized by the State and dishonest plants will work to beat the system thus nullify the intent of the rule.

This rule change should not be supported in the legislature. ATCP 100 amendments as written will not meet its objective. There presently are loop holes that will make the rule ineffective. The zoning of volume premiums to meet the competition will be a violation of the rule once in place. The state will need to spend considerable resource to enforce this rule, making it very costly to the State.

If the State of Wisconsin truly wants to regulate volume premiums, then it should do so in a manner that will meet its objective. The opposite of a volume premium is the hauling charged to farmers. This may be a better avenue to achieve the State's objective, since it allocates cost to the highest user. This would be very similar to what is happening in the utilities. The trend for gas and electric is to charge for the transportation separate from the product.

Thank you for taking the time to review this issue. I hope these comments are helpful. If you have any questions about our position on this issue, I would be glad to discuss them with you. I can be reached at 715-623-2301.

Sincerely

A handwritten signature in cursive script that reads "Paul M. Bauer". The signature is written in dark ink and is positioned above the printed name and title.

Paul M. Bauer
President

FOLEY & LARDNER

ATTORNEYS AT LAW

MILWAUKEE
CHICAGO
WASHINGTON, D.C.
JACKSONVILLE
ORLANDO
TALLAHASSEE
TAMPA
WEST PALM BEACH

150 EAST GILMAN STREET
POST OFFICE BOX 1497
MADISON, WISCONSIN 53701-1497
TELEPHONE (608) 257-5035
FACSIMILE (608) 258-4258
WRITER'S DIRECT LINE

A MEMBER OF GLOBALEX
WITH MEMBER OFFICES IN

BERLIN
BRUSSELS
DRESDEN
FRANKFURT
LONDON
PARIS
SINGAPORE
STUTTGART
TAIPEI

(608) 258-4209

February 20, 1996

VIA FACSIMILE: 224-4939

Mr. Donald J. Furniss
Wisconsin Department of Agriculture,
Trade and Consumer Protection
2811 Agriculture Drive
Madison, WI 53704-6777

Re: Sec. 100.22, Wis. Stats., and Ch. ATCP 100.981,
Wis. Adm. Code

Dear Mr. Furniss:

I enclose additional information related to Dean Food's meeting competition defense under sec. 100.22(3), Wis. Stats., and Wis. Adm. Code 100.982(3). I expect to be able to forward the requested information on costs under sec. 100.22(3) and Wis. Adm. Code 100.982(2) and on the premium program as implemented by this Thursday, February 22nd.

Consistent with our discussions on the 9th, I am also writing on behalf of Dean Foods to request an explanation of the Department's apparent interpretation of the above statutory and administrative prohibitions. Specifically, we would respectfully request that the Department explain its interpretation of the following:

- (1) Volume Premium Defense. Sec. 100.22 makes it "a defense to a prosecution for violation of this section or a special order issued under this section" that the "discrimination in price . . . was commensurate with an actual difference in the quantity of . . . the milk purchased." This language appears to expressly authorize a premium program based on the quantity (volume) of milk purchased. Similar price schedules which differentiate in price commensurate with the quantity of

Mr. Donald J. Furniss
February 20, 1996
Page 2

product purchased are also recognized under the Robinson-Patman Act and other Wisconsin pricing statutes. See Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1326 (6th Cir. 1983) ("The practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers."); sec. 133.05, Wis. Stats. (prohibiting secret payment or allowance of rebates or the secret extension of special services or privileges "not extended to all purchasers purchasing upon like terms and conditions"); sec. 100.31, Wis. Stats. (permitting discrimination in pricing of pharmaceuticals "for volume purchases"). On what basis does the Department maintain that this express defense is unavailable to a prosecution for violation of sec. 100.22 or Wis. Adm. Code 100.981?

- (2) Availability Defense. The prohibition set forth in sec. 100.22(1) and Wis. Adm. Code 100.981 is for a program that "discriminate[s] between producers." The volume incentive program at issue here is available, actually and functionally, to all dairy farmers in the state of Wisconsin. Although not expressly addressed by the statute, the Robinson-Patman Act has been interpreted to permit concessions which are "available equally and functionally to all customers." Bouldis, 711 F.2d at 1326. On what basis does the Department maintain that availability is not a defense to a prosecution for violation of sec. 100.22 and Wis. Adm. Code 100.981?
- (3) Proof of Injury. Both sec. 100.22(1) and Wis. Adm. Code 100.981 require proof that the program either "injures producers" or "injures, destroys or prevents competition between competing purchasers of milk." Providing additional premiums to large volume producers of milk in no way injures other producers. Indeed, enforcement of a prohibition on volume incentive programs is likely only to drive down the price for milk for all producers (or result in elimination of low volume sales altogether). Moreover, competition between purchasers of milk through volume premium programs promotes competition;

Mr. Donald J. Furniss
February 20, 1996
Page 3

certainly, in no way does it injury, destroy or prevent competition. Like all antitrust laws, sec. 100.22(1) was plainly enacted for the "protection of competition and not competitors." See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). Other than the presumption adopted in Wis. Adm. Code 100.985 as part of the Department's emergency rule-making, on what basis does the Department maintain that a volume premium program for raw milk either injures milk producers or competition between competing purchasers of milk as a whole?

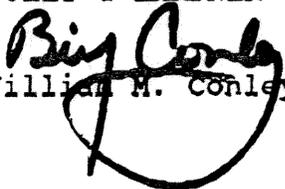
- (4) Emergency Rule. We understand that the Department enacted Wis. Adm. Code 100.981 under its emergency rule-making authority. However, the volume premium programs that purportedly prompted this enactment have been present in the industry for some time. On what basis does the Department maintain that an emergency existed within the meaning of sec. 227.24, Wis. Stats.?

We appreciate your consideration of each of the questions set forth above. As I indicated during our February 9 meeting, Dean Foods is interested in insuring compliance with all applicable Wisconsin law and we appreciate any guidance the Department can provide. If the Department requires any additional information from Dean, we will endeavor to supply it promptly. We would also appreciate an opportunity to discuss the Department's position once you have had an opportunity to consider all the materials provided by Dean.

Thank you for your consideration in this matter.

Very truly yours,

FOLEY & LARDNER


William M. Conley

cc: Sherry Steffel
William Cline



Wisconsin Dairy Products Association, Inc.

TO: Representative Al Ott - 318 N
FROM: Brad Legreid *BLA*
DATE: August 1, 1996
RE: Volume Premium Meeting

After discussions with Don Furniss today, it was decided that Wisconsin Dairy Products Association would sponsor a meeting between industry representatives and WDATCP to make one more attempt at resolving problems in the proposed rule on milk volume premiums. This meeting will be held on Wednesday, August 7, 1996, 1:00 p.m. at the M&I Bank board room, 2900 Fish Hatchery Road, Madison. I would like to invite you to this meeting to share any thoughts you have on this issue.

Kim go

Al, I sincerely appreciate all your efforts in organizing this meeting. Hopefully, some of the problematic areas will be resolved as a result of this meeting.

BAL/mmp

BO days

WATCP (?)

concern with volume premium meeting

circled signature

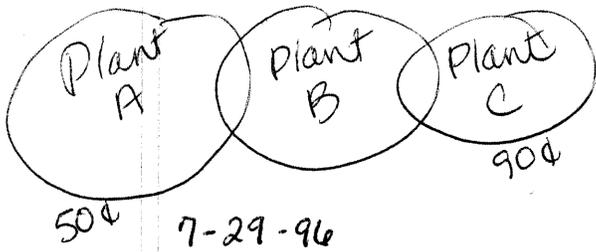
Senats deadline - Aug 3rd

8/6/96 State

- * modifications can be proposed by agency during last 10 days of comm. review period - extends for 10 days
- * following comm. review period - agency can ask for rule back to make modifications and resubmit - starts all over (committee get another 30 days)

*(submitted to comm. by Spm 8-7-96)
 revives Senats for 10 more days*





current 90¢
rule goes into effect
90¢ down 2 or
justifiable

Becca
- Paul Bauer - Antigo
cheese
- Lavern Eckardt

* rule is not enforceable - will create more problems

* Dept. didn't police for a long time - poor job of enforcing in past

1) How will dept. police rule?

- back door arrangements to compete

12% of milk - 1 farm

25% " " - 5 farms

} Antigo Cheese

- can't lose

* escalating
volume premiums

~~Page 1000~~

2) what about haulers compensating farmer above the premium
? how do you track this (underground)

* true cost of hauling - to truly represent economics

- encourages more local procurement of milk

same size farms - 15 miles from plant, 1200 miles

no way to justify same subsidy

selective enforcement

3) some plants pay BGM-free premium - how can this be justified
when there's no test?

(got premium down to 50¢ - "helping small guy" - won't see other 40¢)

* Industry - abolish rule all together

(Larry Lemmenes)

if injured by illegal price discriminations
court - twice their damages

7/30/96

Dean Foods - Franklin Park, IL headquarters

- (largest) ~~100~~ employees in Green Bay
- buy 1 1/2 billion lbs of milk from WI
- 15-16 plants in WI (veg., pickle, dairy)

- concerned about some direction in WI over last few years, esp w/dairy
 - quality premiums
 - rBST labeling (running out of rBST-free milk - have to go out of state)
 - volume premiums
- expend too much time + \$ to jump thru hurdles + conform
- info provided to Dept. in past not utilized

Broydenick (1 hearing)

emergency rule - DATCP asked for extension - JCARE said no

permanent rule (substantive differences)

- 6 hearings

? presumption of competitive injury b/c of different rebates (injury to producers)

Little FTC Act (WI)

violation of price discrimination laws could be construed as unfair

- unfairness is violation

sale
label

Question extension of WI FTC Act to Dean Foods procurement of raw milk
(federal law does not apply to purchase of commodities - sale)

- compliance w/rule won't put \$ in pocket of small producer - will take out of large producer - don't see as a benefit
- could just stop dealing w/ small producers

cannot pay a volume premium beyond actual cost savings (Kleber's interpretation of rule?)

(if the farmer won't
it need either way)

7-30-96

couch

Bill Demick

Admin. of Trade & Consumer Protection

couch

Jim Matson

DATCP Counsel

David Howell

Legislative Council Staff

Al Ott

GIN BROYDREK

Dean Foods

Bill Clino

Dean Foods

Dale Kleber

Dean Foods

John Astor

Dir Trade Practice Bur

ION FURNISH

SECTION CHIEF / DEPT. OF AG

Brad Legreid

WI Dairy Products Assn.

Gay Corbett

Dean Foods

left of Kim

Bob - foremost terms
Farrbender

Bill Kern - Udon foods

Wagner - Weyer

LeGrind

Al Zoller - Kraft John Umhoefer - Cheesemakers
Treipas - Herwig - Matson - Furniss - Norton - new legal guy

8-7-96 - M + J Bank - Fish Hatchery Rd.

Rule effective Oct. 1

1

Producers lawsuit (Matson)

- judge issued order asking for different briefs
? is suit moot b/c emergency rule has expired

what do parties think procedural status is
(schedule to Sept. 30th) moot or not?

- so decision probably not until after
Sept. 30th

⑥ If favor producers / question is what
would happen re: permanent rule b/c suit
was against emergency rule

- keeping court aware of actual enforcement
actions (not waiting for decision from court)

(mode of enforcement)

* ask co's for justification of what appears to be
violations of law - make decision - send to
DOJ ~~prosecutors~~

private lawsuit option (in rule) - for competitors
who feel they were harmed by violations
- double damages / attorney fees / (Little FTC Act)
+ costs

haulers making offers → problem → not enforceable

Furniss - these problems would continue even if law was
eliminated

- Matson
rule →
1. law more clear (constitutes competition, etc.)
 2. private lawsuit remedy adds significant deterrent
 3. haulers' offers - if paid by dairy plant - plants are covered

* law doesn't extend to independent haulers

Zollon - even if dept. subpoenaed records - no way to capture everything
- they pay a check to contract hauler which includes a # of things

Bill Omichen
~~Matson~~ - compare to previous records (was guy pd this previously)

Farrbender - industry can't wait around for 8-12 months for an investigation or even for a suit under private remedy - can't wait around and lose 10% of milk

Matson
current form of law - since 1981
different today b/c people are paying much higher premiums; more concern today; violations more serious

Farrbender - dept's track record on enforcement not good what has changed?
Matson → rule makes law more clear easier to prosecute

Legg - Dept. ignored advisory Comm. recommendations on volume premiums

Furniss - had 2 vol. premiums investigations prior to quality premium issue - people said quality premium issue more important - after - Leggie's said pursue vol. premium change

Legg - small minority of industry who ~~oppose~~ favors rule - w/ private remedy under Little FTC Act - will be a lot of frivolous lawsuits

Zollon - Kraft attorneys laughed at private remedy as a viable option

Legg - bad publicity w/ 1 company challenging another company

Zollon ① Dept. must focus in on hauler loophole (his haulers have told him ways to still be able to pay high premiums)

② Meeting competition defense needs stronger guidelines

Jassbender - Foremost Farms competes w/ entire state - how many different programs should they have

Juriss - up to Foremost Farms to decide if they should use "meeting competition" defense

Jassbender - losing 10% of milk v. gain (if any) through lawsuit / DATCP fine

How can dept. begin process of getting this back in line when rule goes into effect? Co's won't stop paying their premiums

Kline - Dean pay premiums in excess of dept. guidelines - but doesn't pay any producer more than they save - DATCP says do it this way

Matson - can pay producers different amounts as long as the amounts represent difference in costs - Dean always compares highest producer to lowest

Weyawega - we don't need a lot of regulatory problems - WI is in a battle w/ CA + southwest

Jassbender - its clear industry needs to go to legislature on Ch. 122

Kline - this rule will cost dairy industry lots of \$
* "all agrees w/ Dept. + Board - go to court"

COPY



State of Wisconsin
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection

Alan T. Tracy, Secretary

July 30, 1996

The Honorable Thomas D. Ourada
Wisconsin State Representative
P.O. Box 8953
Madison WI 53708-8953

2811 Agriculture Drive
Madison, Wisconsin 53704-6777

PO Box 8911
Madison, WI 53708-8911

File -

Dear Representative Ourada:

Re: **Milk Price Discrimination**

Representative Al Ott shared with me your letter of July 22, 1996 requesting a legislative hearing on Clearinghouse Rule 96-009 related to price discrimination in milk procurement. I am writing to respond to some of the questions raised by your constituent, Paul Bauer.

It is important to understand that the rule, by itself, creates no new prohibition. The rule merely implements an existing statute, s. 100.22, Stats., which already prohibits price discrimination in milk procurement.

Section 100.22, Stats., currently prohibits a dairy plant operator from discriminating between producers in the price paid for milk (e.g., by paying premiums based on volume) unless the operator can justify the discrimination on one of the following grounds:

- The discrimination is based on measurable differences in milk quality.
- The discrimination is justified by an actual difference in procurement costs.
- The discrimination is justified in order to "meet competition."

The department is responsible for administering and enforcing the current statute. However, compliance and enforcement are hampered by a lack of clear standards in the law. This rule will facilitate compliance and enforcement by spelling out standards for determining whether price discrimination is truly justified by differences in milk quality or procurement costs, or is truly justified in order to meet competition, as the statute requires.

Mr. Bauer suggests that the rule is unenforceable, and creates enforcement "loopholes." However, we believe that the rule will facilitate enforcement of the current statute in several ways:

- It will establish clear standards of compliance.
- It will close (not open) "loopholes" by clarifying that the current prohibition applies to discriminatory milk hauling rebates and other "non-price considerations." The rule does not prohibit a dairy plant from charging the full cost of hauling, or imposing different hauling charges based on actual differences in hauling costs. But it does prohibit an operator from discriminating in hauling charges, hauling rebates and other non-price "incentives" unless they can be justified by actual differences in cost.
- It will create a private remedy which can be used by farmers and competing dairy plant operators who are injured by illegal price discrimination. This private remedy will augment the department's enforcement efforts.

Mr. Bauer is concerned that the cost-justification standards in the rule will allow "small, inefficient plants" to pay higher premiums because their costs are higher. However, past experience suggests that larger plants have generally been the leaders in paying discriminatory volume premiums, often to the detriment of smaller plants. It is unlikely that a truly inefficient plant will be able to sustain the payment of unduly high volume premiums over the long run.

Mr. Bauer is also concerned about rule provisions aimed at preventing abuse of the "meeting competition" defense. Under the rule, a large statewide processor could not claim that discrimination between northeastern Wisconsin producers is justified in order to meet a competitor's price offered only in southwestern Wisconsin. But the processor could pay a different price in southwestern Wisconsin in order to meet actual competition there, if the processor chose to do so.

We understand that there are legitimate points of view on all sides of the milk price discrimination issue. However, we have an obligation to administer the law as it currently exists. The proposed rule is the product of an extensive rulemaking proceeding in which the issues were considered at great length. We believe that the rule will facilitate compliance with the current law, and will make that law more enforceable.

If you have any further questions about the proposed rule, feel free to contact me at the numbers listed below.

Rep. Thomas D. Ourada
July 30, 1996
Page 3

Sincerely,



Donald J. Furniss, Chief
Dairy and Food Security Section
Division of Trade and Consumer Protection
Phone: 608/224-4930
FAX: 608/224-4939
E-mail: FURNIDJ@WHEEL.DATCP.STATE.WI.US

cc: Representative Al Ott